

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 7 Case
)	Number <u>82-10700</u>
CHARLES MILNER LIVELY, JR.)	
F/D/B/A LIVELY REALTY CO.)	
)	
Debtor)	
)	FILED
CLAUSSEN CONCRETE COMPANY, INC.)	at 11 O'clock & 29 min A.M.
)	Date: 6-27-90
Movant)	
)	
vs.)	
)	
JAMES D. WALKER, JR., TRUSTEE)	
)	
Respondent)	

ORDER

Movant, Claussen Concrete Company, Inc. (hereinafter referred to as "Claussen") filed an objection to the application for final compensation and reimbursement of expenses and the proposed final distribution of estate property filed by James D. Walker, Jr., the Chapter 7 trustee in this case. After consideration of the record and arguments of counsel, the court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

On September 20, 1985, trustee filed an adversary action against nine (9) defendants, including Claussen to determine the

extent and validity of the judgment liens held by the defendants in property recovered by the trustee after the date of filing of the petition in bankruptcy. The Honorable Herman W. Coolidge, entered an order on December 20, 1985, holding that the defendants

had no valid lien against the property held by the trustee. Only Claussen appealed the ruling to the District Court. The District Court reversed the order of the Bankruptcy Court by order entered May 6, 1987, concluding "that the otherwise valid judgment lien obtained by appellant is enforceable against the property of the estate recovered by the trustee for the benefit of the estate after the filing of the debtor's bankruptcy petition." Walker v. Claussen Concrete Co. (In re: Lively), No. 186-028, slip op. at 5 (S.D. Ga. May 6, 1987). The trustee's motion for reconsideration was denied by the District Court on October 5, 1987. The trustee took an appeal of the order of the District Court to the Eleventh Circuit Court of Appeals. The Eleventh Circuit in an unpublished per curiam opinion affirmed the District Court. Walker v. Claussen Concrete Co. (In re: Lively), No. 87-8823, slip op. (11th Cir. May 11, 1988).

The trustee's proposed distribution of the bankruptcy estate which consists of Nineteen Thousand and Seven Hundred FortyOne and 05/100 (\$19,741.05) Dollars proposes to pay the trustee's commission and expenses, the trustee's attorney fees and the expenses of the trustee's attorney, the expenses due the court, and the secured claim of Sizemore Security International, Inc.

(hereinafter referred to as "Sizemore"). No other creditors would receive any payment. Sizemore, one of the defendants in the adversary proceeding brought by the trustee, holds the senior judgment lien against the debtor's property. Sizemore did not appeal the order entered by the Bankruptcy Court which held its lien to be invalid.

CONCLUSIONS OF LAW

Claussen's objection asserted that since it was the only party who took an appeal from the decision of the Bankruptcy Court, it should be the only party to the action to benefit by the appellate reversal of the decision. Claussen further asserted in its objection that since the property of the debtor is encumbered by their judgment lien, the trustee is not entitled to the payment of his commission,

expenses, and fees from this property.¹ The trustee maintains that the reversal by the District Court which was affirmed by the Court of Appeals served to reverse the entire judgment of the Bankruptcy Court, and all defendants should benefit from the reversal. The trustee also contends that he is entitled to recover his commission, expenses, and fees from property

3

encumber by the judgment liens pursuant to 11 U.S.C. §506(c).

The parties have cited no controlling authority and the court has uncovered none which is on point with the facts of this case. In support of their position that the appellate reversal should benefit only it, Claussen cites two cases which are distinguishable on their facts from this case. In Federated Department Stores v. Moitie, 452 U.S. 394, 101 S.Ct. 2424, 69 L.E.2d 103 (1981), the United States brought an antitrust action, against the owners of various department stores. Seven parallel civil actions were subsequently filed by private plaintiffs tracking the language of the Government's complaint. The actions were dismissed in their entirety on the basis that the plaintiff's had failed to allege an injury to their business or property within the meaning of the Clayton Act. Five (5) of the plaintiffs appealed that judgment to the Court of Appeals for the Ninth Circuit. Two (2) of the plaintiffs, represented by the same attorney, chose not to appeal, but rather refiled the two actions in state court. The actions filed in state court were removed to the District Court and dismissed on the basis of res judicata, and these orders of dismissal also were appealed to the Court of Appeals for the Ninth Circuit. While the appeals were pending, the United States Supreme Court in an

¹Regarding the objection to the payment of the trustee's commission and expenses of administration, in its briefs submitted Claussen seems to have abandoned this aspect of the objection as it only addresses the trustee's proposed payment of attorneys fee and priority of distribution of funds to creditors. As this aspect of the objection seems abandoned, the approval of the requested commission and expenses of administration is made with reference solely to 11 U.S.C. §325(a).

unrelated action decided that retail purchasers can suffer an injury to their business or property as those terms are used in the Clayton Act. The Circuit Court reversed the five cases in the first appeal and remanded them for further proceedings. The

4

Ninth Circuit also reversed the decision of the District Court which had dismissed the last two cases on the grounds of res judicata stating that because the dismissal was based on a case that had been effectively overruled, the doctrine of res judicata must give way to public policy and simple justice. The Supreme Court reversed the Ninth Circuit as it pertained to the two "state court" actions holding that the doctrine of res judicata should be enforced by the courts. Federated Department Stores, supra at 401, 101 S.Ct. at 2429, 69 L.E.2d at _____.

In this case the trustee brought a single adversary proceeding against numerous defendants. The Bankruptcy Court entered a single order, and one of the defendants appealed that order. The District Court entered an order which provided, "Accordingly, The (sic) order of the bankruptcy court is REVERSED." Claussen Concrete Co. v. Walker (In re: Lively), No. 186-028, slip op. at 6 (S.D. Ga. May 6, 1987). The Order of the District Court was not directed only at the claim of Claussen, but at the order of the Bankruptcy Court. Unlike Federated Department Stores there were not multiple actions, some of which were appealed and some of which were not appealed. In Federated Department Stores nonparties to the action attempted to benefit from the appellate reversal. Here, the defendants in the action brought by the trustee all had their rights determined by a single order of the court based on a single principle of law.

Claussen also relies on the case of Torres v. Oakland

5

Scavenger Co., 487 U.S. 312, 108 S.Ct. 2405, 101 L.E.2d 285 (1988). In Torres, sixteen (16) plaintiffs intervened in an employment discrimination suit and sought

class action certification. The District Court dismissed the action for failure to state a cause of action upon which relief could be granted. The dismissal was prior to any determination on class certification. A notice of appeal was filed, but the notice and subsequent orders reversing the District Court, omitted Torres's name. The omission was caused by a clerical error on the part of a secretary employed by Torres's attorney. The Supreme Court held that the Court of Appeals had no jurisdiction over Torres since he was not named in the notice of appeal. The Supreme Court based its decision on the construction of Rule 3(c) of the Federal Rules of Appellate Procedure.

Torres is substantially different than this case. Torres involved numerous plaintiffs who were attempting to intervene in a pending action and seeking class certification. Torres turns on the construction of Federal Rule of Appellate Procedure 3(c) where each named plaintiff had a separate claim against a defendant. Here, Claussen was one of nine (9) defendants in an action brought by the trustee to determine the extent, priority, and validity of their liens in property. The opinion of the District Court which was affirmed by the Court of Appeals reversed the decision of the Bankruptcy Court and held that "a judgment lien is not invalidated by either a filing or a discharge in bankruptcy. (citations omitted). The lien continues and attaches to after-acquired

6

property of the debtor. (citations omitted)." Claussen Concrete Co., No. 186-028, slip. op. at 5 (S.D. Ga. May 6, 1987).

Once it is determined that the lien of Claussen attaches to after-acquired property of the debtor, the priority of the lien is determined under state law. Worthen Bank & Trust Co. v. Hilyard Drilling Co. (In re: Hilyard Drilling Co.), 840 F.2d 596 (8th Cir. 1988). The liens of all creditors named by the trustee in the action are valid liens under state law. Claussen is entitled to receive only that which it would receive under applicable state law and the appellate reversal does not permit Claussen to gain rights, a priority in distribution, to which it is not entitled under state law.

As the issues resolved in this order are novel, Claussen equitably is entitled to recover its reasonable attorney fees incurred in defending the action brought by the trustee and for the appeals. The Bankruptcy Court may issue any order or judgment necessary or appropriate to carry out the provisions of Title 11. 11 U.S.C. §105(a). Claussen incurred legal fees in defending an action, prosecuting an appeal, and responding to an additional appeal which was resolved in favor of the judgment lien claimants. Claussen cannot receive advantage over the other defendants who will benefit from the appellate reversal, but is entitled to the reimbursement of its legal fees incurred to the extent those services benefited the defendants. Authorizing the recovery of attorneys fees and costs incurred by Claussen is necessary to

7

prevent the superior lien claimants from recovering at Claussen's expense as their recovery is due solely to Claussen's effort. By recovering its attorneys fees and costs, Claussen merely is placed in the same position as if the Bankruptcy Court had ruled correctly in the first instance. Although Claussen is reimbursed part of its attorneys fees and costs, it remains in the same position as to its claim in relation to other lien claimants.

The trustee also incurred substantial necessary and reasonable attorney fees in prosecuting the action and during the appeals. However, as a **general rule**, secured creditors do not bear the cost of bankruptcy administration except as provided by 11 U.S.C. §506(c). C.I.T. Corp. v. A & A Printing, 70 B.R. 878, 880 (M.D. N.C. 1987). Section 506(c) provides that "[t]he trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim." "Allowance of costs and expenses [under section 506(c)] . . . requires a careful examination of (a) the purpose for which

such costs and expenses were incurred, (b) who, if anyone, derived a benefit therefrom, and (c) the extent of such benefit." 3 Collier on Bankruptcy ¶506.06 (L. King 15th ed. 1989). Section 506 "does not permit the recoupment of expenses which benefit the estate at large, but help secured creditors only indirectly." C.I.T. Corp., supra at 880.

Applying the above criteria, the trustee's legal fees

8

incurred in bringing and prosecuting the actions that resulted in the recovery by the bankruptcy estate to which the creditor's liens attach could be recovered from property securing these allowed secured claims.² In this case, all of the property in the estate was recovered as a result of the trustee's actions, and all creditors secured by the property benefitted from the trustee's recovery of the property. Each benefitted secured creditor should bear a portion of the trustee's legal fees incurred in recovering this property in the same percentage as the amount each creditor was to receive on its claim, before the trustee's legal fees are deducted, bears to the full amount recovered and available for distribution to these creditors.³

The secured creditors did not benefit by the legal fees incurred in bringing the proceeding to determine the extent and validity of the liens against the recovered property nor the subsequent appeals. In fact, the creditors expended time, effort, and money in defending the action and subsequent appeals that resulted in a judgment in their favor. No basis exists under section

²In its briefs submitted, Claussen concedes this portion of the trustee's attorneys fees.

³This formula shall be utilized by the trustee in calculating payment of Claussen's attorney's fees and expenses as well.

506(c) to force the secured creditors to bear the trustee's legal fees and expenses incurred in filing and prosecuting an action and subsequent appeals against their interest. No other basis exists

9

under which the trustee may recover such expenses from estate property which is encumbered by liens.

Accordingly, it is ORDERED that the objection of Claussen is denied in part and sustained in part as set forth above;

Further ORDERED that Claussen file and serve within fifteen (15) days an appropriate application to recover its legal fees and expenses incurred in defending the action brought by the trustee to determine the validity of its lien and all subsequent appeals, including any legal fees incurred in filing this objection to the extent such fees were incurred in objecting to the trustee's claim for attorneys fees; and

Further ORDERED that within fifteen (15) days of Claussen's filing, the trustee file an amended application for final compensation and proposed distribution of the estate property in accordance with this order.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 27th day of June, 1990.